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The Degree Of Nondisclosed Evidence Sufficiently Exculpatory To Constitute A Denial Of Due Process - State v. Giles

The Degree Of Nondisclosed Evidence Sufficiently Exculpatory To Constitute A Denial Of Due Process

State v. Giles[1]

Defendants, convicted of raping a sixteen year old girl,[2] were granted a new trial by the Circuit Court for Montgomery County under the Post Conviction Procedure Act.[3] This decision resulted from a finding that the prosecution had suppressed and withheld certain evidence from the defendants in violation of their constitutional right to due process. The evidence in question was information concerning an alleged incident of rape[4] of the prosecutrix by persons other than the defendants which occurred after the rape for which defendants were convicted but prior to their trial; and information concerning an alleged suicide attempt by the prosecutrix following the alleged rape incident.[5]

In reversing the granting of post-conviction relief, the Maryland Court of Appeals held that while the suppression or withholding by the state of material evidence exculpating an accused violates his right to due process,[6] the nondisclosed information in the present case was neither material to the guilt or punishment imposed nor prejudicial to the defendants.[7] Judge Oppenheimer, joined by Judge Hammond,

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1. 239 Md. 458, 212 A.2d 101 (1965).

2. *Affirmed,* Giles v. State, 229 Md. 370, 183 A.2d 359 (1962), *appeal dismissed,* 372 U.S. 767 (1963). Subsequent denial of a motion for a new trial based on newly discovered evidence was affirmed on procedural grounds, Giles v. State, 231 Md. 387, 190 A.2d 627 (1963).

3. MD. CODE ANN. art. 27, § 645A (Supp. 1964), discussed in 19 MD. L. REV. 223 (1959) and 24 MD. L. REV. 46, 53 (1964).

4. Facts determined at the lower court PCPA hearing indicated that the prosecutrix attended a party in another county about five weeks after the incident involving the defendants. She had intercourse there — allegedly against her will — with two boys, with one of whom she had had intercourse on previous occasions. She would have consented to these acts if not fearful that others at the party would also have wished to participate. Her family, subsequently learning of these incidents, made a complaint to Montgomery County police, but were told the complaint had to be made in the county where the acts occurred. Thereupon, her father made a complaint to the Prince George's County police, who interviewed the prosecutrix in the hospital (see note 5, *infra*) and were informed that she did not desire to file any complaints and had not authorized any to be made. She further refused to testify if the complaint was pursued. With the consent of the girl's father, the interviewing officer then marked the case closed and unfounded.

In addition to the above evidence, several affidavits filed at the hearing and executed by acquaintances of the prosecutrix indicated that she was a sexually promiscuous girl. It should be noted that the basis of Giles' defense was that the prosecutrix not only consented but suggested and invited intercourse.

5. On the morning after the party, the prosecutrix was admitted to Prince George's General Hospital, having taken an overdose of sleeping pills in what was diagnosed as an attempted suicide, secondary to an "adjustment reaction of adolescence."

The attending psychiatrist testified at the lower court hearing that an attempted suicide by a teenager was, in his opinion, evidence of mental illness; however, he stated that an attempted suicide would not permit an opinion as to her mental condition at the time of the defendants' trial five months later.

6. 239 Md. at 468, 212 A.2d at 107. The court cited Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), *aff'd,* 373 U.S. 83 (1963), noted in 23 MD. L. REV. 178 (1963).

7. *Id.* at 474, 212 A.2d at 111.

filed a strong dissent, taking issue primarily with the majority's having "put themselves in the place of the triers of the facts."[8] Conceding that the court-appointed defense counsel knew of prior acts of unchastity of the prosecutrix, the dissenting opinion contended that "the additional withheld evidence might have made possible a far more effective cross-examination than mere knowledge of prior acts of unchastity of itself permitted."[9] The dissent further stated:

> If information is withheld by the prosecution and if that information, although not pursued by the prosecution, of itself would have reasonably led to the procuring of information usable in any manner in the defense of the accused, that fact of itself should make the withholding of the uncommunicated matters the basis for a new trial.[10]

This case presents two questions for discussion. First, under what circumstances is the prosecution in a criminal case obligated to disclose evidence possibly material to the guilt of or the punishment imposed upon the accused? Second, when is evidence of sufficient materiality to render its nondisclosure a violation of defendant's right to due process?

The public prosecutor has been charged with the formidable responsibility of insuring justice to the accused through a fair and impartial trial[11] while exercising his official duty in representing the state[12] in a quasi-judicial capacity.[13] When the prosecutor becomes aware of evidence favorable to the accused, either prior to or during

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8. *Id.* at 479, 212 A.2d at 113. Four years before *Giles,* the Court of Appeals itself stated: "[I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant. . . ." Brady v. State, 226 Md. 422, 430, 174 A.2d 167, 171 (1961), *aff'd,* 373 U.S. 83 (1963).

9. *Ibid.* See Napue v. Illinois, 360 U.S. 264, 269 (1959), where the Supreme Court said: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . ."

10. *Id.* at 480, 212 A.2d at 114.

11. Since the common law system of jurisprudence is based upon presentation of evidence by adversaries, the Supreme Court has found it necessary to pronounce the principle underlying this delicate balance of dual responsibility as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88 (1935).

12. See Viereck v. United States, 318 U.S. 236 (1943); Berger v. United States, 295 U.S. 78 (1935); United States v. Graham, 325 F.2d 922 (6th Cir. 1963); United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963); Wasey v. State, 236 Ind. 215, 138 N.E.2d 1 (1956).

13. State v. Selle, 367 S.W.2d 522 (Mo. 1963); People v. Lombard, 4 App. Div. 2d 666, 168 N.Y.S.2d 419 (1957); State v. Rose, 62 Wash. 2d 309, 382 P.2d 513 (1963).

the trial, the disclosure of such evidence may be required[14] to comply with his higher obligation,[15] and the failure to do so may result in a denial of due process.[16] While such duty does not extend to facts readily available to a diligent defender,[17] it includes a responsibility to call witnesses,[18] albeit they may not favor his position, and to refrain from the knowing use of false testimony.[19]

The case of *Griffin v. United States*[20] has been relied upon to support the requirement that the prosecution disclose evidence that "may reasonably be considered admissible and useful to the defense." The Maryland Court of Appeals in the present *Giles* case, maintaining that admissibility and usefulness are not the sole determinants of suppression sufficient to constitute a denial of due process,[21] has added the requirement that such evidence must be "exculpatory," *i.e.*, "material and capable of clearing or *tending to clear* the accused of guilt or of substantially affecting the punishment to be imposed."[22]

The leading Maryland case prior to *Giles* was *Brady v. State*,[23] where, in a felony-murder prosecution, the state's attorney had failed

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14. See *infra* for further discussion of this requirement. The leading cases in Maryland are Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), *aff'd*, 373 U.S. 83 (1963) and Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), noted in 25 MD. L. REV. 79 (1965). Cases in other jurisdictions include United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953); Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950). See also Napue v. Illinois, 360 U.S. 264 (1959); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949); People v. Tann, 326 Mich. 361, 40 N.W.2d 184 (1949); People v. Parks, 20 App. Div. 2d 907, 249 N.Y.S.2d 14 (1964). For further analysis, see Note, *The Duty of Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960).

15. Viereck v. United States, 318 U.S. 236 (1943); Berger v. United States, 295 U.S. 78 (1935); People v. Carr, 163 Cal. App. 2d 568, 329 P.2d 746 (1958).

16. Where such denial is so found, conviction must be reserved. Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), *aff'd*, 373 U.S. 83 (1963). See Annot., 33 A.L.R.2d 1421 *et seq.* (1953).

17. United States v. Soblen, 301 F.2d 236 (2d Cir. 1962); *In re* Lessard, 62 Cal. 2d 516, 42 Cal. Rptr. 583, 399 P.2d 39 (1965); *In re* Imbler, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), *reh. on other grounds*, 61 Cal. 2d 556, 39 Cal. Rptr. 375, 393 P.2d 687 (1964).

18. See 60 COLUM. L. REV., *supra* note 14, at 865–68.

19. Mills v. People, 139 Colo. 397, 339 P.2d 998 (1959); Hall v. Warden, 222 Md. 590, 158 A.2d 316 (1960). See Napue v. Illinois, 360 U.S. 264, 269 (1959), where the Supreme Court said, "[I]t is established that a conviction obtained through use of false evidence known to be such by representatives of the state, must fall under the Fourteenth Amendment." See also Annot., 2 L. ed. 2d 1575 (1958).

20. 183 F.2d 990, at 993 (D.C. Cir. 1950). Newly discovered evidence of an uncommunicated threat of deceased, known to the prosecution prior to trial but undisclosed to the defendant, was held sufficiently material on the issue of self-defense to require granting of a new trial.

21. 239 Md. at 471, 212 A.2d at 107.

22. *Id.* at 471–72 and 108. The court accepted the definition of "exculpatory" pronounced in Dean v. State, 381 P.2d 178 (Okla. Crim. 1963). In support of this requirement, the court cited State v. Morris, 69 N.M. 244, 365 P.2d 668, 669 (1961), which stated that deliberately suppressed evidence "constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused, or to the penalty to be imposed."

23. 226 Md. 422, 174 A.2d 167 (1961), *aff'd*, 373 U.S. 83 (1963). There, the prosecution had knowledge of the nondisclosed evidence but thought it to be inadmissible.

to inform defense counsel of the existence of the confession of defendant's accomplice to the effect that the accomplice had actually committed the homicide. The court in *Giles* supported its new requirement by holding the *Brady* evidence to have been exculpatory on the issue of either guilt or punishment. The court also cited *Barbee v. Warden*[24] as adhering to the *Griffin* test and additionally involving exculpatory evidence. There, the nondisclosed evidence was a police ballistics report that the gun found in the car of defendant accused of the murder of a police officer, and described by witnesses as similar to the one carried by defendant at the time of the shooting, was not the gun used to kill the officer. In essence, the requirement that the prosecutor disclose exculpatory evidence[25] not available to the defendant is now definitive law; yet, the critical question remains — when are these nondisclosed facts considered exculpatory?[26]

In cases where the prosecutor is aware that a testifying witness is guilty of perjury and such testimony is relevant to the guilt or punishment of defendant, such information is certainly exculpatory[27] and must be corrected by the prosecution.[28] If the testimony, while not false, leaves the jury with an inaccurate picture and the prosecutor has information unavailable to the defendant, he is obligated to correct such distortion where it affects the guilt[29] or punishment[30] of defendant.

A leading case is *United States ex rel. Thompson v. Dye*,[31] where, after defendant was convicted of first degree murder, his counsel learned

24. 331 F.2d 842 (4th Cir. 1964). In this case there was doubt as to the prosecutor's knowledge of nondisclosed evidence; however, the United States Court of Appeals pointed out, at 846, "[T]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of a nondisclosure." Thus, in the *Giles* case, the court, after quoting *Barbee*, concluded, 239 Md. at 470, 212 A.2d at 108: "It would not be unreasonable therefore to charge the prosecutor and his agents . . . with knowledge of all seemingly pertinent facts related to the charge which are known to the police department who represent the local subdivision that has jurisdiction to try the case."

25. The court pointed out that where doubt exists as to what is admissible and useful to exculpate defendant, the trial court should determine whether a duty to disclose exists. 239 Md. at 471, 212 A.2d at 109.

26. It is upon this question that Judge Oppenheimer took issue with the majority, note 9 *supra* and accompanying text.

27. Strosnider v. Warden, 228 Md. 663, 666–67, 180 A.2d 854, 856 (1962); see also note 19 *supra*.

28. Hall v. Warden, 222 Md. 590, 158 A.2d 316 (1960). It should be noted that the duty to disclose false testimony is not a duty peculiar to a prosecutor but rather a duty of every attorney. *In re* Carroll, 244 S.W.2d 474 (Ky. 1951); *In re* Gladstone, 185 App. Div. 471, 173 N.Y.S. 89 (1918); *In re* Abuza, 178 App. Div. 757, 166 N.Y.S. 105 (1917); *In re* King, 7 Utah 2d 258, 322 P.2d 1095 (1958). Also see ABA: CANONS OF PROFESSIONAL & JUDICIAL ETHICS, Canons 29 & 41 (1957).

29. See, *e.g.*, Turner v. Ward, 321 F.2d 918 (10th Cir. 1963), where in a rape prosecution, the state's attorney allowed the doctor who had examined the victim to testify in such a manner as to leave the jury with the impression that rape had been committed, which he knew was contrary to the doctor's opinion, and withheld the physician's opinion that sodomy had been committed on the victim.

30. See, *e.g.*, Alcorta v. Texas, 355 U.S. 28 (1957), where a husband accused of his wife's murder claimed that the killing occurred in a fit of passion on discovering his wife kissing a man in a parked car late at night. At the trial, the man's testimony gave the jury the false impression that his relationship with deceased was merely casual, when prosecutor had been told by him that he had had illicit intercourse with victim. The Supreme Court held this omission was seriously prejudicial, since acceptance of the defense by the jury would have precluded an offense punishable by death.

31. 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955).

of a report by a police officer indicating that the defendant had been intoxicated and in a quarrelsome mood at the time of arrest.[32] The prosecutor knew of the officer's willingness to testify to this but instead called other officers, directing his questions in such a manner as to exclude this information. The Third Circuit Court of Appeals reasoned that this practice of the prosecution resulted in a suppression of vital evidence material to the accused's guilt and punishment, *i.e.,* exculpatory evidence, constituting a denial of due process.[33]

The general problem of impeaching the credibility of witnesses, particularly those whose testimony is essential to the prosecution's case, clearly has relevance to the issue of non-disclosure. If the state's attorney prior to trial knows that qualified physicians employed by his office to examine the defendant, the victim or witnesses, believe such persons are legally incompetent, and he has failed to inform the defense or the court of such opinions, he has clearly breached his duty and denied the accused his right to due process.[34]

Among other pertinent items of information which are admissible to attack credibility and which may carry an obligation of disclosure where exculpatory are the possible insanity of the witness,[35] his prior confinement in a mental hospital,[36] or prior inconsistent statements.[37] A further extension of this obligation may include information that the prosecution's witnesses have made an agreement to receive lenient treatment in return for testifying against defendants. Usually such points are elicited on cross-examination; however, when the witness denies any prior promises of leniency, the prosecution must correct this testimony, if known by him to be untrue, as it is material to the credibility of such a witness.[38]

Where the knowing use of false testimony is present, there is a tendency not to require any showing of prejudice resulting from the acts of prosecution.[39] In cases which involve a passive nondisclosure of exculpatory evidence, one must show some degree of conduct so offensive to our traditional sense of justice that it fails to achieve the minimum requisites of a fair trial.[40] This requirement is said to vary inversely with the gravity of the act of omission in the conduct of the trial.[41]

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32. It should be noted that the effect of the nondisclosed evidence, if accepted by the jury, would have precluded the necessary intent for first degree murder.

33. 221 F.2d at 768. Judge Hastie, in a concurring opinion, pointed out that questions of fundamental fairness depend so much on the facts of the particular case that a precise rule cannot be devised. *Id.* at 769.

34. Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied,* 375 U.S. 931 (1963).

35. Powell v. Wiman, 287 F.2d 275 (5th Cir.), *reh.,* 293 F.2d 605 (1961).

36. Walley v. State, 240 Miss. 136, 126 So. 2d 534 (1961).

37. Powell v. Wiman, 287 F.2d 275 (5th Cir.), *reh.,* 293 F.2d 605 (1961).

38. Napue v. Illinois, 360 U.S. 264 (1959), quoted in notes 9 & 19 *supra;* People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853 (1956).

39. Barbee v. Warden, 331 F.2d 842, 847 (4th Cir. 1964).

40. "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice'." Rochin v. California, 342 U.S. 165, 173 (1952).

41. Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961).

A discussion of the necessity of disclosure is incomplete without the practical realization that the discovery by the defendants of such exculpatory evidence is a prerequisite to any subsequent claim of denial of due process. Perhaps the most acute situations involving this problem of discovery are exemplified by the distinction between the introduction of a gun purported to be defendant's and to have been used in the killing, where the ballistics report is negative,[42] and those circumstances where the prosecutor, realizing the nature of the report is damaging to his case, withholds mention of the gun altogether.[43] Certainly, the probability of the defense discovering such exculpatory information in the latter case is quite remote. The existence of tangible evidence found by police at the scene of the crime, which would tend to exculpate defendant,[44] or of disinterested witnesses who claim to have seen either no one or persons other than defendant at the scene of the crime, must be disclosed to the defense prior to or during the trial, if the prosecutor has reason to believe their existence would otherwise be unknown.[45] The destruction of[46] or the refusal to produce[47] evidence material to the defendant's guilt or punishment has also been held sufficient to reverse a conviction.

It would appear then that the answer to the second question posed above — *when is* evidence sufficiently material to render its nondisclosure prejudicial — rests largely with the discretion of the court;[48] this is well demonstrated by the majority and dissenting

42. This is the fact situation of the *Barbee* case, 331 F.2d 842 (4th Cir. 1964).

43. In United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407 (3d Cir. 1952), defendant and two companions were convicted of the felony-murder death of a policeman during the robbery of a supermarket. At the trial of an accomplice, subsequent to the defendant's trial, information tending to show another policeman had fired the fatal shot, with a confirming ballistics report, was introduced. The prosecution in the defendant's trial had known of this information but failed to call witnesses to support that theory. The Court of Appeals held this to be reversible error as a suppression of evidence denying due process, since it was vital to the issue of punishment.

44. People v. Hoffman, 32 Ill. 2d 96, 203 N.E.2d 873 (1965). *Cf.*, in regard to the use of illegally seized evidence by the prosecution, the discussion in Fahy v. Connecticut, 375 U.S. 85 (1963) (swastika-painting violation) and United States *ex rel.* Holloway v. Reincke, 229 F. Supp. 132 (D. Conn. 1964) (narcotics violation).

45. United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Application of Kapatos, 208 F. Supp. 883 (S.D. N.Y. 1962).

46. Curran v. State of Del., 259 F.2d 707 (3d Cir. 1958), *cert. denied,* 358 U.S. 948 (1959).

47. Kyle v. United States, 297 F.2d 507 (2d Cir. 1961). Another problem involving refusal is the delicate question of the informer privilege. For discussion, see White v. United States, 330 F.2d 811, 813–14 (8th Cir.), *cert. denied,* 379 U.S. 855 (1964), where the Eighth Circuit Court of Appeals cited Roviaro v. United States, 353 U.S. 53 (1947), as laying down the rule that the government may not refuse to disclose the identity of an informer instrumental in the apprehension of a defendant charged with a narcotics violation on the grounds that the information is privileged. In conjunction with *Roviaro,* they also cited United States v. Clark, 220 F. Supp. 905 (E.D. Pa. 1963), as holding that the government's inability to produce at the trial an informer and eye-witness to the charged crime constitutes a denial of due process as a suppression of material evidence, unless it is demonstrated that reasonably sufficient efforts by the prosecution to secure such informer's presence proved fruitless. For recent elaboration see, Note, *The Present Extent of the Informer Privilege,* 25 MD. L. REV. 57 (1965).

48. Note Judge Hastie's opinion in United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 769 (3d Cir.), *cert. denied,* 350 U.S. 875 (1955).

opinions in the main case.[49] Some guidelines can be stated nonetheless. Items such as fingerprints, bloodstains and scientific reports, while not always clearly admissible, can be invaluable in showing innocence or guilt and may be vital for impeachment purposes.[50] Because of the great probative value of such tests, they should be freely discoverable,[51] and the withholding of such information generally will be construed as a denial of due process. In instances where the nondisclosed evidence is less clearly exculpatory, however, the defendant must essentially rely on the basic integrity of the prosecutor, coupled with the possibility of reversal for any resulting unjust conviction, to assure the prosecutor's compliance with his duty of disclosure. The courts in these instances appear less willing to overturn convictions.

In the principal case, the court rejected the allegation that the attempted suicide demonstrated any incompetency of the prosecutrix as a witness, or that it could be used for purposes of impeaching her credibility.[52] The appellees also contended that the nondisclosed incidents showed the prosecutrix to have been afflicted with nymphomania — a type of mental illness. The court conceded that evidence of nymphomania was admissible on the issue of credibility[53] but refused to accept an inference of such condition on the facts presented in the record. The rule established in the principal case requires that the withheld evidence must be: (1) material to the defense (*Brady* test); (2) capable of clearing or tending to clear the defendant (*Barbee* test); and (3) admissible and useful to the defense (*Griffin* test). By fusing these separately enunciated requirements into one all-encompassing test, the Court of Appeals has made any of the alternative single tests insufficient and has imposed a heavy burden on the defendant adversely affected by the wrongful suppression of evidence.

However, even if this new rule of law is not considered intolerable, it is arguable that the court deprive the defendants here of their right to due process. While the nondisclosed information is inadmissible under the present rule excluding specific acts of misconduct to establish lack of chastity, it would have been useful in cross-examination and, as the dissent argued, perhaps admissible when viewed within the context

49. The lower court, in granting the PCPA relief, had relied on Smallwood v. Warden, 205 F. Supp. 325 (D. Md. 1962), where, like *Giles*, the defense to a rape indictment was consent. It appears that the physician who examined the complaining witness in this case had told the prosecution of her repeated acts which he characterized as leading her into trouble sooner or later; however, this physician was not called upon to testify. The District Court held that the failure of the state's attorney to disclose information as to the history, physical condition, and reputation of prosecutrix, together with inadequate representation of counsel, was sufficient to vitiate the conviction.

The *Giles* court distinguished *Smallwood* as being a nondisclosure of evidence likely to affect the result of the trial, 239 Md. at 473, 212 A.2d at 110, while they concluded in *Giles* that the withheld information would not likely have affected the result.

50. Note Judge Oppenheimer's dissent in *Giles*, 239 Md. 458, 475, 212 A.2d 101, 111–14.

51. See Note, *Pretrial Discovery in Criminal Cases*, 42 NEB. L. REV. 127, 131–32 (1962).

52. 239 Md. at 472, 212 A.2d at 109. The dissent, however, maintained that such information might well have cast doubt on the credibility of the witness.

53. *Id.* at 474, 212 A.2d at 110–11. The court cited in support thereof People v. Bastian, 330 Mich. 457, 47 N.W.2d 692 (1951). See also 3 WIGMORE, EVIDENCE § 934(a) (3d ed. 1940).

of the case.[54] Furthermore, the information was certainly material to the witness's credibility.[55] But the majority, placing themselves in the position of the triers of the facts, speculated that the jury would have attached little significance to the withheld evidence. Under the circumstances, this would appear to have been an incorrect basis of decision.[56]*

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54. *Id.* at 479, 212 A.2d at 113. See also 3 WIGMORE, *op. cit. supra* note 53, § 979, at 537 (3d ed. 1940), which concludes:

> There is however one situation in which an exception should be recognized, in spite of these reasons of policy, *viz.*, where the witness is a *woman-complainant* on a charge of *sex-offense*. To ascertain such a witness's veracity without an inquiry into her life-history is psychologically impossible, for her testimonial trustworthiness is often linked inseparably with her other traits. These cannot be ascertained without considering specific acts of her past behavior.

55. *Ibid.* See also note 10 *supra*. The dissent cited 3 WIGMORE, *op. cit. supra* note 53, § 934(a) (3d ed. 1940):

> Occasionally is found in women complainants, testifying to sex-offences by men, a dangerous form of abnormal mentality — dangerous here, because it affects testimonial trustworthiness while not affecting other mental operations. It consists in a disposition to fabricate irresponsibly charges of sex-offences against persons totally innocent. . . . Sometimes it is associated with unchaste conduct in the witness, sometimes not. But its nature is well known to psychiatrists and is recognizable by them. Testimony to its existence in an individual should always be receivable.

56. See notes 8 & 9 *supra* and accompanying text.

* EDITOR'S NOTE: Certiorari has been granted by the U.S. Supreme Court, 34 U.S.L. WEEK 3317 (March 22, 1966).